Georgia Power Company *and* International Brotherhood of Electrical Workers, Local Union No. 84. Case 10–CA–33361

June 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On September 12, 2002, Administrative Law Judge Pargen Robertson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent filed exceptions and a supporting brief, the Charging Party International Brotherhood of Electrical Workers, Local Union No. 84 (Union) filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[1]

1. For the reasons set forth in his decision, we agree with the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(2) and (1) of the Act by creating its Workplace Ethics Program, and by recognizing, supporting, and assisting it. A prerequisite to finding such a violation is that the entity involved is a "labor organization" as defined in Section 2(5) of the Act. *Crown Cork & Seal Co.*, 334 NLRB 699, 700 (2001). The record supports the judge's key finding that Workplace Ethics is not a labor organization under Section 2(5) because it does not exist, even in part, for the purpose of "dealing with" the Respondent. Id. Compare *Keeler Brass Co.*, 317 NLRB 1110, 1114 (1995) ("dealing with" found because "grievance procedure functioned as a bilateral mechanism, in which the Respondent and the Committee went back and forth explaining themselves until an acceptable result was achieved").

2. The judge found, and we agree for the reasons set forth in his decision, that the Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes in bargaining unit employees' terms and conditions of employment by implementing the Workplace Ethics program, without providing the Union notice and adequate opportunity to bargain.[2] In addition, we agree with the judge, as set forth in his decision, that the Respondent bypassed the Union and dealt directly with bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act by communicating directly to unit employees regarding the formation of Workplace Ethics by its memorandum dated June 1, 2001. See *Southern California Gas* Co., 316 NLRB 979, 982 (1995) (direct dealing occurs when respondent communicates directly with union-represented employees to the exclusion of the union, for the purpose of establishing or changing terms and conditions of employment or undercutting the Union's role in bargaining). We further agree with the judge, as set forth in his decision, that the Respondent engaged in direct dealing with the represented employees in its creation of the five work teams, prior to the implementation of the Workplace Ethics Program. The Respondent solicited employee participation (including employees represented by the Union) in forming these work teams, and did not consult the Union in so doing.[3]

3. We reverse, however, for the reasons set forth below, the judge's finding that the Respondent bypassed the Union and dealt directly with bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act by establishing a "Crew Leader Selection Committee" (CLSC) to review the selection process for crew leader positions.

The record shows[4] that the Respondent and the Union have negotiated a memorandum of understanding for a crew leader selection process. Some senior employees complained to management when they were not selected

[1] We have modified the judge's recommended Order to conform to the violations found, and have substituted a new notice that reflects these changes.

[2] Chairman Battista notes that the Respondent's October 2001 invitation to the Union to bargain over the Workplace Ethics program came too late to relieve the Respondent of liability. Following its announcement in June 2001 to the employees of the Workplace Ethics committee, the Respondent immediately began operating the program by processing employee concerns. Thus, by the time the Respondent offered to bargain with the Union about the change, the program was already operational.

[3] Chairman Battista finds it unnecessary to decide whether there was a direct dealing violation with respect to the Respondent's June 1 memo, in which it informed the employees of the Workplace Ethics program. The Respondent had met with and notified the Union of its intention to implement the committee prior to sending this memo to the employees. See *Permanente Medical Group, Inc.*, 332 NLRB 1143, 1144 (2000) (finding no direct dealing where the employer kept the union informed before and during the "design phase," leading up to the proposal for changes). An additional "direct dealing" violation would not materially affect the remedy.

[4] The Respondent argues in its exceptions that the record does not support the judge's finding that it impaneled an employee input committee in addition to the CLSC. We find merit in Respondent's exception. In this section of our decision, we have summarized the record facts pertaining to the CLSC issue.

as crew leaders under that negotiated process. The Respondent thereafter created an employee committee concerning the crew leader selection process: the CLSC. The Respondent sought employee volunteers to serve on the CLSC. Unit employees served on the CLSC; a management official was also appointed; and an additional management official supervised the CLSC process.

The Respondent advised the CLSC that they were not to negotiate or to even get into the subject matter of negotiations. The Respondent's manager of labor relations, Henry Lightfoot specifically assured union Business Manager Doyle Howard that the crew leader selection process would not change without negotiations.

The CLSC only met twice. It then submitted a memo to Respondent's vice president Mickey Brown setting forth "recommendations from Committee to review Crew Leader Selection Process." The Respondent has made no changes to the crew leader selection process.

An employer may lawfully consult with its own employees in formulating proposals for bargaining. *Permanente Medical Group*, supra, 332 NLRB at 1144. The Respondent's establishment of the CLSC was a lawful effort by Respondent to formulate proposals regarding the crew leader selection process.

In *Permanente Medical Group*, the respondent, a health care service provider, used employee volunteers to provide input during the design phase of a program to increase patient and family involvement in care and to reorganize care management.[5] The Board found no direct dealing violation. The Board emphasized that the respondent made it clear that the design phase in which employees participated would yield only a proposal to be presented to the unions for bargaining. The respondent further "always made clear that its bargaining obligation ran to the Unions." 332 NLRB at 1145. It likewise told the employee participants that they would not be engaged in bargaining or setting any working conditions, and that the design phase was not intended to be a substitute for negotiations with the unions. The Board accordingly concluded that the respondent "simply turned to its employees to assist it in formulating" its proposal to the unions while concomitantly honoring its bargaining obligation to the unions. Id.

Permanente Medical Group is dispositive of the instant issue. There is no dispute that the Respondent here made clear that it would honor its bargaining obligation to the Union, and that the crew leader selection process would change only via negotiations. Union Business Manager Howard conceded at the hearing that the Respondent's manager of labor relations, Lightfoot explicitly notified him that the Respondent was "not going to change" the parties' agreed-upon crew leader selection process "without negotiating it." Indeed, Lightfoot testified that he advised Howard that if the Respondent sought changes as a result of the CLSC, "I would contact [Howard] and he could pick his committee, we would pick ours, and we would negotiate [any] changes."[6] The Respondent likewise cautioned the CLSC members that they were not to engage in negotiations. The Respondent here thus lawfully turned to its employees to assist it in formulating proposals,[7] while remaining vigilant in honoring its obligation to bargain exclusively with the Union. We shall accordingly dismiss this complaint allegation.[8]

Our dissenting colleague seeks to distinguish *Permanente* on the ground that, in the instant case, Union Business Manager Doyle sought to be on the committee, and the Respondent denied the request. We believe that this fact does not warrant a result contrary to *Permanente*. The critical point is that the Respondent was developing a *management proposal* to present to the Union. There was no obligation to involve a union representative in the formulation of a management proposal.

Moreover, our dissenting colleague relies on *Central Management Co.*, 314 NLRB 763 (1994), and *Allied-Signal, Inc.*, 307 NLRB 752 (1992), in support of his assertion that the Respondent's conduct was "likely to erode the Union's position as exclusive representative." As in *U.S. Ecology Corp.*, 331 NLRB 223 (2000), these cases are materially distinguishable from the facts before us. While the employer in *Central Management Co.* "offered more favorable terms to the employees *on the condition that they abandon the union* . . . [n]o such quid pro quo offer is alleged or evident here." *U.S. Ecology*, supra, 331 NLRB at 226–227, fn. 23 (emphasis in original). In *Allied-Signal*, the employer unilaterally implemented a smoking ban pursuant to the recommendations of an employee task force, and the union was not aware of the task force until the ban had been imposed. Here, however, the Respondent made no changes to the crew

[5] Several unions represented the employees involved in the design phase.

[6] The judge thus erred in finding that the evidence did not show that preparation for negotiations was a reason underlying the CLSC. Our dissenting colleague likewise errs in claiming that the Respondent excluded the Union from the process; the Respondent rather specifically *included* the Union by its offer to bargain. Neither the dissent nor the Union assert that this was not a bona fide offer.

[7] See *E.I. du Pont & Co.*, 311 NLRB 893, 894 (1993) (employer may lawfully form an employee "brainstorming" group to develop a "host of ideas" from which employer "may glean some ideas").

[8] The judge did not address the complaint allegation that the Respondent violated Sec. 8(a)(5) and (1) of the Act by establishing CLSC unilaterally and without notice to the Union. No party has filed exceptions on this issue.

leader selection process, and it assured the Union that it would not make changes without negotiating first.

AMENDED CONCLUSION OF LAW

Substitute the following for conclusion of law number 3 in the judge's decision

"3. By making unilateral changes in bargaining unit employees' terms and conditions of employment by implementing the Workplace Ethics program without providing the Union notice and adequate opportunity to bargain, and by bypassing the Union and dealing directly with bargaining unit employees, the Respondent has engaged in conduct in violation of Section 8(a)(5) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Georgia Power Company, Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in bargaining unit employees' terms and conditions of employment by implementing the Workplace Ethics program without providing the Union notice and adequate opportunity to bargain.

(b) Bypassing the Union and dealing directly with bargaining unit employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, cease using the Workplace Ethics program regarding bargaining unit employees to the extent that the Workplace Ethics program involves changes from the procedures existing under the Respondent's prior programs.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit as described in the parties' memorandum of understanding effective from July 1, 1999 to June 30, 2002.

(c) Within 14 days after service by the Region, post at its Atlanta, Georgia facility and other facilities at which unit employees are regularly employed, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since June 1, 2001.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I dissent from the majority's unwarranted reversal of the judge's finding that the Respondent bypassed the Union and dealt directly with bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act by establishing a "Crew Leader Selection Committee" to review the selection process for bargaining unit crew leader positions.[1]

It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees. An employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(5) and (1). *Armored Transport, Inc.*, 339 NLRB No. 50, slip op. at 3 (2003); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–684 (1944). The Respondent's total exclusion of the Union from the Crew Leader Selection Committee process (CLSC) contravened these established principles.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] In all other respects, I agree with the majority opinion.

There is no dispute that the Respondent and the Union negotiated a process for the selection of crew leaders, and embodied their agreement in a memorandum of understanding. By virtue of the Union's status as exclusive-bargaining representative, the Respondent was obligated to deal only with the Union with respect to this subject. However, when some employees expressed to the Respondent their concerns about the negotiated crew leader selection process, the Respondent instead met directly with them. Thereafter, without even notifying the Union, the Respondent created an employee committee to review the selection process (the CLSC), sought employee volunteers to serve on the CLSC, met with the employees serving on the CLSC, and solicited their comments on a draft memorandum proposing eight changes to the negotiated procedure. The Respondent flatly barred the Union from any participation in the CLSC whatsoever.

These facts are materially distinguishable from those of *Permanente Medical Group*, 332 NLRB 1143 (2000), relied on by the majority. The respondent there informed the unions at the outset of its plans for its health care initiative, and union representatives were invited to and did participate in the process. Here, by contrast, the Respondent at all material times excluded the Union from the CLSC, even after union Business Manager Doyle Howard learned about it and sought to participate.[2] Howard telephoned the Respondent's manager of labor relations, Henry Lightfoot, objected to the CLSC because it was dealing with the parties' negotiated agreement, and alternatively sought union participation in the process by helping select unit employees for the CLSC. The Respondent rebuffed Howard's entreaty. The Respondent's direct communication with unit employees, to the exclusion of the Union, strongly supports a finding of unlawful direct dealing. *Southern California Gas Co.*, 316 NLRB 979, 982 (1995). As stated by the Second Circuit Court of Appeals in *NLRB v. General Electric Co.*,[3] direct dealing will be found when the employer has chosen "to deal with the Union through the employees, rather than with the employees through the Union." This is precisely what the Respondent did.

The majority errs in finding that the Respondent's direct dealing was ameliorated because it stated that it would not bargain with unit members serving on the CLSC, or that it would at some subsequent unspecified time bargain with the Union. In order to find direct dealing, "[i]t is not necessary that the employer actually bargain with the employees. The question turns on whether the employer's direct solicitation of employee sentiment over working conditions is likely to erode the union's position as exclusive representative." *Central Management Co.*, 314 NLRB 763, 767 (1994). There is no dispute that crew leader positions are highly sought after by employees, and that the selection process is of particular significance to them. The evidence fully supports the judge's key finding that the Respondent's direct dealing with employees, concerning the coveted crew leader positions and changes to a procedure it negotiated with the Union, was likely to erode the Union's position as exclusive representative. *Allied-Signal, Inc.*, 307 NLRB 752, 753–754 (1992). The Respondent's conduct necessarily undermines the collective-bargaining process and the principle of exclusive representation on which it depends.

Dated, Washington, D.C. June 30, 2004

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT make unilateral changes in bargaining unit employees' terms and conditions of employment by implementing the Workplace Ethics program without providing International Brotherhood of Electrical Workers, Local Union No. 84 notice and adequate opportunity to bargain.

WE WILL NOT bypass the Union and deal directly with bargaining unit employees.

[2] A union member, who had been solicited by Respondent to serve on the CLSC, advised Howard of its existence.

[3] 418 F.2d 736, 759 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970). Accord: *Armored Transport, Inc.*, supra, slip op. at 3.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, on request of the Union, cease using the Workplace Ethics program regarding bargaining unit employees to the extent that the Workplace Ethics program involves changes from the procedures existing under the Respondent's prior programs.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit as described in the memorandum of understanding effective from July 1, 1999 to June 30, 2002.

GEORGIA POWER COMPANY

Lisa Y. Henderson, Esq. for General Counsel.
Laura H. Kriteman, Esq. and *Fred Dawkins, Esq.* for the Respondent.
J. Michael Walls, Esq. for the Charging Party.

DECISION

PARGEN ROBERTSON, Administrative Law Judge. This hearing was on May 13, 2002 in Atlanta, Georgia. I have considered the full record in reaching this decision, including demeanor of the witnesses and briefs filed by Counsel for General Counsel, Respondent, and Charging Party.

Jurisdiction

Respondent is a Georgia corporation with an office and place of business in Atlanta, Georgia. It is engaged in the business of generating and distributing power utility services. During the preceding 12-month period, a representative period, it received revenues in excess of $250,000 from providing electrical power services to enterprises in Georgia; which enterprises, in turn, during the same period, purchased and received goods valued in excess of $50,000 from suppliers located outside Georgia. Respondent admitted that at all times material, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act.

Labor Organizations

Respondent admitted that International Brotherhood of Electrical Workers Local 84 is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act and that it and the Union have been parties to several collective bargaining agreements with the most recent being effective July 1, 1999 to June 30, 2002. The Union represents the employees covered by those collective-bargaining agreements.

The Unfair Labor Practice Allegations

General Counsel alleged that Respondent engaged in conduct in violation of Section 8(a)(1), (2) and (5). The alleged 8(a)(2) conduct included creating a labor organization; and recognizing and rendering assistance and support to that labor organization. Respondent allegedly violated Section 8(a)(5) by unilaterally and through direct dealing with employees, implementing a grievance procedure that included employee representatives and by establishing a committee to review the selection process for bargaining unit crew leader positions.

The Record Evidence
Created Workplace Ethics?
Recognized and helped Workplace Ethics?

Employees including those within and outside the bargaining unit, were notified of Respondent's implementation of Workplace Ethics, by memorandum dated June 1, 2001 (GC Exh. 22):

> The following announcement is being sent to all Georgia Power employees on behalf of President and CEO David Ratcliffe:
>
> Today I am announcing the formation of a new Workplace Ethics department. The new group combines the roles of Corporate Concerns and parts of the Southern Company Services EEO function.
> This department will report to Frank McCloskey, currently vice president of Diversity Action. Frank's organization will now be called Diversity and Workplace Ethics. A new Workplace Ethics manager position will be posted internally and externally in the coming days. This manager will report to Frank.
>
> It is critical to our company that we do the best job possible in welcoming and resolving employee concerns. Our current method of handling employee complaints has been in place for more than a decade. During that time new approaches have been developed by other companies that we feel will improve our program. Our new approach will emphasize proactive communication and use of concerns as key source for surfacing issues.
>
> I would be remiss if I did not take this opportunity to thank both Lee Glenn and Herman Pennamon, who have been running our Corporate Concerns and EEO processes. They have both done an excellent job in handling many employee issues with professionalism and integrity. Our desire to change these programs in no way reflects on the fine job they have both done.
>
> The new process for resolving employee concerns will differ from the previous ones in several ways. Among them:
>
> When Workplace Ethics staff members, who will be called employee advocates, are unable to resolve a concern through functional management, the employee will be able to take his case to an in-house ombudsman, Frank McCloskey. Frank will have authority to make final decisions on workplace ethics issues, accountable only to me.
>
> Employees will be able to report concerns using a toll-free number staffed by an outside firm.
>
> A peer review process is currently being designed. In this approach to dispute resolution, trained volunteer employees will review concerns and make binding decisions. The process

> will be implemented in phases, beginning with customer operations.
>
> Concerns about discrimination or harassment will go to Workplace Ethics, rather than EEO. EEO will now focus on Affirmative Action planning and monitoring, while handling inquires from the EEOC and the Georgia Department of Labor for Georgia Power.
>
> You'll be hearing more about the peer review process later this summer, when its design is complete. This is a "best practices" approach that has been used successfully at other companies to improve trust and openness in the concerns process.[1]

The parties stipulated that Respondent placed employees, including bargaining unit employees, on its Ethics Employee Review Panels and that it compensated all employees, supervisors, and managers for time served on the Ethics Review Panels.

Union Business Agent Doyle Howard testified that Respondent first advised him about its Workplace Ethics during a July 17, 2001 meeting. Howard was told that Respondent formerly had two programs. One was EEO and the other Corporate Concern. Those two programs were being combined into one program that would be called Workplace Ethics.

In the fall of 2001, Union and Respondent met regarding Workplace Ethics. Bentina Chisolm explained the program for Respondent. Her presentation included a slide presentation and a full explanation of the program. Ms. Chisolm answered questions as she made her presentation. The Union was given an outline, which was similar to the slide presentation. At one point during Chisolm's presentation Doyle Howard objected to inclusion of bargaining unit employees in the Workplace Ethics Program on the grounds that the Union was the unit employees sole representative and the collective-bargaining agreement included a grievance procedure.

Since implementing the Workplace Ethics program, Respondent has not advised the Union whenever it received a grievance from a bargaining unit employee and the Union has not been afforded opportunities to represent unit employees during Workplace Ethics grievances.

Andrea Jackson testified that she was a meter reader.[2] Jackson received disciplinary action in September 2001. She was placed on decision-making leave for not reporting an accident. Jackson contacted Walter Dukes who is Respondent's manager over Distribution. Dukes advised her to contact her Shop Steward and Dukes gave her some information on Workplace Ethics. Dukes told Jackson that she should contact Jo Molock.

Jackson filed a grievance under the parties' collective-bargaining agreement.[3] After completing the first step of the grievance, Jackson contacted Bentina Chisolm in Workplace Ethics. Jackson questioned Chisolm as to whether she should be talking with Workplace Ethics in view of the Union's lawsuit claiming Workplace Ethics was unlawful. Chisolm told her that Workplace Ethics was not trying to do away with the Union and that Workplace Ethics was set up to represent the employees and conduct investigations. Bentina Chisolm said that Jackson could continue her case with the Union at the conclusion of the Workplace Ethics process. In November Bentina Chisolm phoned Jackson and said that she had made her decision and that she was ruling in Jackson's favor. However, Jackson later learned that reference to the alleged accident was not removed from her personnel file. Jackson contacted Bentina Chisolm again in January. After an investigation Chisolm told Jackson that she would continue to be charged with the accident, which had given rise to her disciplinary action. Jackson filed a second grievance with the Union. Before the grievance was resolved Jackson was terminated on other grounds.

Respondent called Howard Winkler who was formerly its labor relations coordinator.[4] Winkler testified that before formation of Workplace Ethics, employees submitted concerns and discrimination claims to either Corporate Concerns or EEO. Both unit and nonunit employees used those programs. Corporate Concerns investigated a broad array of employee complaints including concerns about discipline or termination and general issues of unfairness. EEO focused on charges of illegal discrimination.

Respondent's CEO set up five work teams[5] of employees to investigate general areas of concern to employees during July 2000. Those work teams made recommendations, which were eventually reduced to some 33 projects, including the review and improvement of Corporate Concerns and EEO. Winkler was involved in researching ways to improve Respondent's programs. Among other things he considered how implementation of the various alternatives would impact on its collective-bargaining agreement. Ultimately Respondent changed to the Workplace Ethics Program after it became convinced that program would not impact on its collective-bargaining agreement to any greater extent than had its previous Corporate Concerns and EEO Programs.

Bentina Chisolm started working for Respondent on August 1, 2001 as manager of Workplace Ethics. Her understanding was that Workplace Ethics could address any issues filed by employees except issues covered by the Memorandum of Agreement[6] with the Union. Chisolm made a presentation to the Union as well as to employees both within and outside the

[1] As shown below Respondent actually implemented a Workplace Ethics practice that differed from the one outlined above. Bentina Chisolm testified that Workplace Ethics followed the procedure shown in R. Exh 2. An employee would first contact an outside organization through a toll free call and meet with an employee of Respondent (workplace ethics coordinator). The workplace ethics coordinator would investigate the employee concerns and attempt to resolve any differences with management. If the employee was dissatisfied with the results following the coordinator's decision, he or she could appeal to either an "Employee Review" panel or to a company officer. The decision of the review panel or company officer would be final.

[2] Meter reader is a bargaining unit position.

[3] The parties collective-bargaining agreement is entitled "Memorandum of Agreement" and is sometimes referred to as MOA.

[4] From 1991 through 1995 Winkler worked in Respondent's human resources department. He had some dealings with Corporate Concerns and EEO during that period. Winkler is currently Respondent's human resources strategy director.

[5] Howard testified that the work teams included bargaining unit employees.

[6] The parties' collective-bargaining agreement is entitled "Memorandum of Agreement."

bargaining unit, regarding Workplace Ethics and she supplied the Union with a memorandum outlining that presentation (R. Exh. 1):

> As you are aware the enhanced Workplace Ethics process is available to bargaining unit employees. The purpose of this memorandum is to explain how Workplace Ethics and Labor Relations will manage cases brought by bargaining unit employees. If you have any questions please feel free to contact either Labor Relations or Workplace Ethics.
>
> Workplace Ethics will notify Labor Relations of all Workplace Ethics cases/concerns involving covered employees.
>
> If a covered-employee concern has been filed involving an issue covered by the Memorandum of Agreement (MOA), the employee will be advised that contractual issues should be addressed through the bargaining unit and Labor Relations following the provisions of the MOA.
>
> If a covered-employee concern involves a Discharge, Demotion or Discipline for violation of a provision of the MOA, Workplace Ethics and Labor Relations will make a cases by case determination as to whether the employee is eligible for the Workplace Ethics process. The employee will be notified of this determination. The provisions of paragraph 63 of the MOU that require covered employees to file certain grievances within 20 days will not be extended.
>
> If a covered-employee concern has been filed with Workplace Ethics involving a Discharge, Demotion or Discipline, and a grievance has also been filed related to the same concern, the responsible manager will be notified. The manager may choose not to rule on the grievance while Workplace Ethics investigates the concern. However, management should not be hesitant in making timely, sound decisions during the grievance process. Labor Relations does have a responsibility to ensure that grievances are resolved promptly.
>
> If the Workplace Ethics Coordinator recommends a change to the supervisor's original action regarding a covered employee, the supervisor or the manager who has heard the grievance may choose at any time to follow the recommendation.
>
> Prior to arbitration certification, if the Employee Review Panel of Review Officer rules regarding a covered employee, that ruling becomes the decision of the Company, and the grievance decision will be amended if a change needs to be made.
>
> If the Union certifies a grievance for arbitration, Workplace Ethics will no longer handle the case/concern. The arbitration award will be the final decision of the case/concern regardless of the Workplace Ethics recommendation, the Employee Review Panel decision or the Review Office decision.

Respondent Manager of Labor Relations Henry Lightfoot first notified the Union about its change to the Workplace Ethics program at a meeting on May 30, 2001. At that time M.O. Wallace was the union business agent. A few days after the meeting, Wallace contacted Lightfoot and said the Union could not support the Workplace Ethics process. The next meeting Lightfoot held with the Union was delayed until July 17 when he met with Doyle Howard.[7] Lightfoot advised Howard of the planned Workplace Ethics Program and, on October 10, Respondent through Bentina Chisolm made a Workplace Ethics presentation to the Union. Shortly after the October 10 meeting, Howard phoned Lightfoot that he had problems with Workplace Ethics and wanted to know if the parties could work anything out. Subsequently, Lightfoot told Howard that unless he had something specific to propose, Respondent would go ahead with Workplace Ethics. Lightfoot testified that it is his opinion that Respondent had a right to implement Workplace Ethics under the management rights clause of the Memorandum of Agreement.[8]

Established a committee reselection of crew leaders?

Business Agent Doyle Howard testified without dispute, that the Union and Respondent have agreed to a crew leader selection process. However, in late October 2001 a member of the bargaining unit told Howard that he was on a committee formed by Respondent that was considering how to improve the crew leader selection process. Howard objected but Respondent replied the committees would not talk about any negotiated part of the crew leader selection process.

Respondent Manager of Labor Relations Henry Lightfoot testified that some senior employees complained when they were not selected as crew leaders under the process negotiated with the Union. Instead, a junior employee had been selected. The employees complained that the crew leader selection process was unfair. Management met with those complaining employees and then asked Lightfoot if it could legally put together a focus group or committee to seek input from employees. Subsequently Union Business Agent Doyle Howard phoned Lightfoot and inquired about the input committee. Howard complained that he should be on the committee and Lightfoot disagreed. Lightfoot testified that no changes have been made in the negotiated crew leader selection process.

Findings

Credibility

The record showed there were no material credibility conflicts. Minor conflicts including whether Doyle Howard objected to the Workplace Ethics program during a presentation by Bentina Chisolm, are insignificant in view of the fact that both witnesses for General Counsel and Respondent testified

[7] After the May 30, 2001 meeting M.O. Wallace advised Lightfoot that he was not seeking reelection and that issues including Workplace Ethics would be delayed until the new administration came in. Lightfoot recalled that Doyle Howard replaced Wallace on July 13, 2001.

[8] The parties' Memorandum of Agreement includes a management clause in article III. However, there is nothing in that provision which purports to give management the right to establish Workplace Ethics.

that the Union did object to Workplace Ethics on more than one occasion.

Findings of Fact

Created, recognized and helped Workplace Ethics?

Respondent implemented Workplace Ethics in 2001. Before that Respondent had two programs, (i.e. Equal Employment Opportunity and Corporate Concerns). Respondent showed among other things, a July 2000 "Diversity Initiative" illustrated to it that employees viewed the EEO and Corporate Concerns programs as deficient in a number of areas. Respondent combined the EEO and Corporate Concerns programs into the Workplace Ethics program. The Workplace Ethics program as well as the EEO and Corporate Concerns programs before it included both employees represented by the Union and employees that were not represented by the Union.

Respondent first notified the Union of its Workplace Ethics program on May 30, 2001. Subsequently, the Union's new business agent was told of Workplace Ethics on July 17, 2001. A formal presentation outlining the Workplace Ethics program was made to the Union executive board on October 10, 2001.

Under Workplace Ethics, an action is initiated when an employee files a concern. A Workplace Ethics Coordinator investigates the concern "by talking to all involved parties and viewing all relevant documents." The Workplace Ethics coordinator then "meets with the concerned individual and management separately to convey the results of the investigation." Respondent may follow or ignore the Coordinator's recommendation. The concerned individual may appeal an unfavorable outcome of the Coordinator investigation to the Employee Review Panel or to a Review Officer. The Panel or Officer may hear witnesses and review documents and then either grant, modify or deny the employee's concern. That decision, whether from the Employee Review Panel or a Review Office, is binding on Respondent.

Employees in the bargaining unit may pursue a concern or a grievance separately, or simultaneously pursue a grievance under the Memorandum of Agreement and a concern through Workplace Ethics. Workplace Ethics proceedings are automatically terminated if a grievance filed under the parties' collective-bargaining agreement on the same issue is certified for arbitration.

Former bargaining unit employee Andre Jackson filed a grievance and a concern with Workplace Ethics. She had been disciplined for failing to report an accident in a company vehicle. Jackson first filed a grievance under the MOA. Afterward she filed a concern with Workplace Ethics. The Workplace Ethics investigator, Bentina Chisolm, determined that the disciplinary action was not warranted. At that time Jackson did not pursue her grievance but, on subsequently discovering she was still charged with the accident,[9] Jackson filed a second grievance. Ms. Jackson was terminated on nonrelated grounds two days after she filed her second grievance and that grievance was never processed.

[9] Jackson's record showed that she was charged with an accident even though her disciplinary action from that alleged accident, was removed from her file.

Established a committee re selection of crew leaders?

In the fall of 2001 Respondent impaneled an employee committee to provide input regarding its crew leader selection process.

Respondent informed the Crew Leader Selection Committee[10] of the results of the employee committee meeting. The Union objected to examination of the crew leader selection process. Respondent replied that the Crew Leader Selection Committee would not change the crew leader selection process without negotiations. After two meetings, the Crew Leader Selection Committee submitted a memorandum to Respondent's senior vice president of distribution, which included several recommendations on how to improve the crew leader selection process.

Findings of Law

Workplace Ethics

Section 8(a)(1) and (2)

In this alleged violation of Section 8(a)(2), my initial inquiry must concern whether Workplace Ethics constitutes a labor organization. If Workplace Ethics were a labor organization, it would be an unfair labor practice under Section 8(a)(2) for Respondent to dominate or interfere with the formation or administration of, or to contribute financial or other support to, Workplace Ethics.

> "Under the statutory definition set forth in Section 2(5), the organization at issue is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of 'dealing with' employers, and (3) these dealings concern 'conditions of work' or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment.
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> . . .
> . . .
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> Notwithstanding that 'dealing with' is broadly defined under Cabot Carbon, it is also true that an organization whose purpose is limited to performing essentially a managerial or adjudicative function is not a labor organization under Section 2(5). In those circumstances, it is irrelevant if the impetus behind the organization's creation emanates from the employer. See General Foods Corp., 231 NLRB 1232 (1977) (employer created job enrichment program composed of work crews of entire employee complement); Mercy-Memorial Hospital, 231 NLRB 1108 (1977) (committee decided validity of employees' complaints and did not discuss or deal with employer concerning the complaints); John Ascuaga's Nuggett, 230 NLRB 275, 276 (1977)(employees' organization resolved employees' grievances and did not interact with management). Electromation, Inc., 309 NLRB 990 (1992).

Respondent does not dispute (1) that employees including bargaining unit employees, participated in Workplace Ethics

[10] The Crew Leader Selection Committee included three bargaining unit employees among its six members.

employee review panels and (2) that Workplace Ethics panels dealt with employee concerns not otherwise controlled by the Memorandum of Agreement. Respondent does dispute that Workplace Ethics panels dealt with management regarding terms and conditions of employment (*Crown Cork & Seal*, 334 NLRB 699 (2001)).

In *Crown Cork & Seal* there was no union organizational activity when a system of employee committees was formed and there was no union organizational activity at any time material to the alleged unfair labor practices.

There were a total of seven *Crown Cork & Seal* committees. Four of the committees dealt with workplace issues including production, quality, training, attendance, safety, maintenance and discipline short of suspension or discharge. The three remaining teams existed one administrative level above the four production teams. Those three teams included the Organizational Review Board, the Advancement Certification Board, and the Safety Committee. The Organizational Review Board monitored plant policies to insure uniform administration among the four production committees. The Organizational Review Board also suggested modifications to plant norms including hours, layoff procedures, smoking policies, vacations and all terms and conditions of employment, and it reviewed production team recommendations to suspend or discipline a team member. The Advancement Certification Board was authorized to administer the "Pay for Acquired Skill Program." It certified that employees had advanced to higher skill levels and recommended pay increases to the plant manager. The Safety Committee was authorized to review production team accident reports and it considered the best methods to ensure a safe workplace.

Above those three teams was a 15-member management team and, ultimately, the plant manager. The plant manager had ultimate authority to review all decisions made by the committees. The decisions and recommendations of the three committees (i.e., Organizational Review Board, the Advancement Certification Board and the Safety Committee) were given great weight and rarely overruled. The NLRB found no unfair labor practice in holding that the seven *Crown Cork & Seal* committees did not "deal with" management within the meaning of Section 2(5). Instead the Board found that the committees were management within the scope of their delegated spheres of authority. In so holding the Board found that the *Crown Cork & Seal* committees exercised managerial authority at each level. The four production committees exercised authority comparable to a front-line supervisor and the three higher-level committees exercised authority that would be clearly supervisory, in a traditional plant setting.

I am convinced that application of the *Crown Cork & Seal* standards, illustrates that Respondent did not engage in Section 8(a)(2) violations with its Workplace Ethics program. As in *Crown Cork & Seal*, the Workplace Ethics process resulted in management level decisions at the end of each procedure. Only in the step 1 procedure was there anything approaching "dealing with" management. There the Workplace Ethics Coordinator was charged with trying to resolve concerns by talking with management and the employee. However, that does not constitute dealing with management under *Crown Cork & Seal*. There is no mechanism in Workplace Ethics, which involves a pattern, or practice in which the Workplace Ethics Panels make proposals to Respondent and Respondent responds to those proposals in word or deed. I find that General Counsel failed to prove that Workplace Ethics panels constitute a labor organization and failed to prove that Respondent engaged in a violation of Section 8(a)(1) and (2).

Section 8(a)(1) and (5)

The question here is whether Respondent had an obligation to bargain with the Union regarding Workplace Ethics. As shown above, no union was involved and, of course, there was no obligation to bargain, in *Crown Cork & Seal*. Although that decision was relevant to consideration of the Section 8(a)(2) allegations, it is not relevant to a consideration of Section 8(a)(5). Here, Respondent had an obligation to bargain with a union regarding working conditions of unit employees.

The Union and General Counsel argued that Respondent had an obligation to bargain before making unilateral changes in working conditions and an obligation to avoid dealing directly with bargaining unit employees. Respondent argued that it made no changes. Instead it simply consolidated two programs into one, by uniting Corporate Concerns and EEO. Respondent argued that it had no obligation to bargain because Workplace Ethics involved a purely managerial function.

As to the argument that Respondent was obligated to bargain before making unilateral changes, Respondent first notified the Union of its plan to implement Workplace Ethics on May 30, 2001. However, the evidence shows without dispute that Respondent did not afford the Union an opportunity to bargain before it implemented Workplace Ethics.[11]

However, the record shows that Respondent did change its grievance procedure by implementing Workplace Ethics. For example, internal memoranda show that Respondent formerly advised unit employees to exercise their grievance rights under the collective-bargaining agreement before coming to Corporate Concerns (GC Exh. 14).[12] After Workplace Ethics was implemented, unit employees including Andrea Jackson, were told they could pursue concerns under Workplace Ethics simultaneously from or separately with, collective-bargaining grievances. Another example of unilateral change is reflected on page 2 of General Counsel's Exhibit. 14. There two internal memoranda discuss whether to include unit employees on a Workplace Ethics employee panel if the respective employee expressed an obligation to vote for a fellow union member.

[11] See for example, the testimony of Respondent Manager of Labor Relations, Henry Lightfoot where he testified the Union objected to Workplace Ethics shortly after May 30, 2001 but Respondent continued to develop Workplace Ethics. Lightfoot went on to testify that shortly after the October presentation to the Union, the Union objected to the program and wanted to know if the parties could work anything out. The Union was told that Respondent would go ahead with Workplace Ethics unless the Union had something specific to propose.

[12] Two viewpoints are reflected in the memoranda shown on page 1 of GC Exh. 14, regarding how concerns were formerly handled under Corporate Concerns. Nevertheless both memos make it apparent that changes were made when Respondent advised unit employees under Workplace Ethics that concerns could be filed separately or simultaneously with grievances.

Another example is shown in Bentina Chisolm's October 2001 Workplace Ethics report to the Union. There, among other things, Chisolm stated that if a unit employee had a pending concern with Workplace Ethics and a grievance was filed under the Memorandum of Agreement, the responsible manager could elect not to rule on the grievance while Workplace Ethics investigates the concern. Those examples illustrate that the implementation of Workplace Ethics generated new issues and Respondent resolved those issues unilaterally. Moreover, Respondent ignored the Union and dealt directly with employees including bargaining unit employees. The employees were independently notified of its Workplace Ethics program and both unit and nonunit employees were included on committees involved in creation and maintenance of Workplace Ethics.

The evidence does not support Respondent's argument that Workplace Ethics is a purely managerial decision making vehicle. Instead Workplace Ethics is a grievance procedure vehicle designed to provide employees with a different procedure for resolving distasteful managerial decisions without resort to the Union.

It is well established that the subject of grievances is a mandatory subject of collective bargaining. *Hughes Tools Co. v. NLRB*, 147 F.2d 69 (5th Cir. 1945); *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987).

Respondent also argued that Respondent does not deal directly with employees during the Workplace Ethics procedure. However, the record evidence shows that Respondent first dealt directly with employees regarding its establishment of Workplace Ethics. For example on June 1, 2001 Respondent advised both unit and nonunit employees of the formation of Workplace Ethics. In its June 1 memo, Respondent informed the employees among other things, that it would use new approaches for resolving employee concerns and it listed some specific examples of how it would employ new approaches. Moreover, as shown in the testimony of Howard Winkler, Respondent has dealt directly with employees set up in five work–teams toward what eventually became Workplace Ethics. *Allied-Signal, Inc.*, 307 NLRB 752 (1992).

I am convinced that Respondent implemented a new grievance procedure called Workplace Ethics without bargaining with the Union and it dealt directly with employees in developing and maintaining Workplace Ethics, in violation of Section 8(a)(1) and (5).

Established a committee regarding selection of crew leaders?

Respondent argued that its employee committee was nothing more than a brainstorming committee and there was no direct dealing with employees on that committee. However, I must keep in mind that Respondent admittedly formed that committee for the specific purpose of considering the unfairness of the crew leader selection process and the crew leader selection process had been formed through negotiations with the Union. Respondent also argued that it assured the Union that the crew leader selection process would not change without negotiations.

Respondent's argument is specious. An employer may not escape accountability by simply telling the Union it does not intent to engage in unlawful activity. In actual practice, Respondent selected an employee input committee for the specific purpose of criticizing a procedure it devised through negotiations with the Union. Respondent then lent support to the legitimacy of that employee committee by informing the Crew Leader Selection Committee of the results of the committee's deliberations.

In its argument regarding direct dealing and Workplace Ethics, Respondent agreed that a key inquiry into whether it violated Section 8(a)(1) and (5) by seeking information from employees through the input committee, is "whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode 'the Union's position as exclusive representative." Nevertheless, that is precisely what its action regarding the crew leader selection input committee, tended to accomplish. The employee committee was asked if a procedure Respondent arranged in agreement with the Union was unfair. Obviously, by its actions in putting that question to the committee, the Respondent was holding out that it, but not necessarily the Union, was willing to reconsider the process for selecting crew leaders. Therefore, it should not be blamed for any "unfairness" that may arise under the current system. Instead, by implication, the only party that should be blamed for any unfairness was the Union. That evidence shows that Respondent, by seeking information from the input committee, was taking action, which had the tendency to erode the Union's position. *Allied-Signal, Inc.*, 307 NLRB 752 (1992).

Respondent also argued that it is entitled to seek employee input for bargaining purposes. However, the evidence failed to show that preparation for negotiations was ever a reason behind the input committee. According to undisputed evidence, that committee was formed solely because some senior employees complained about the crew leader selection process. Moreover, Respondent never told the Union that it was seeking information for bargaining purposes.

I find that Respondent engaged in direct dealing with bargaining unit employees, in violation of Section 8(a)(1) and (5), by forming an input committee to consider the unfairness of the crew leader selection process and by advising the Crew Leader Selection Committee of the input committee's deliberations.

CONCLUSIONS OF LAW

1. Georgia Power Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers Local 84 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by unilaterally changing the grievance procedure for bargaining unit employees, by bargaining directly with bargaining unit employees over its Workplace Ethics program, and by bargaining directly with bargaining unit employees concerning its crew leader selection process, has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7) and (8) of the Act.

5. Respondent did not engage in conduct in violation of Section 8(a)(1) and (2) as alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefore and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that as Respondent has illegally changed its grievance procedures by implementing Workplace Ethics without bargaining with the Union, it is ordered to cease using Workplace Ethics regarding bargaining unit employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is hereby ordered that Respondent, Georgia Power Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in bargaining unit employees' grievance procedures without providing notice of the proposed changes and adequate opportunity for the Union to bargain about those changes.

(b) Implementing and continuing Workplace Ethics involving bargaining unit employees.

(c) Dealing directly with bargaining unit employees regarding Workplace Ethics and its crew leader selection process.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain collectively with International Brotherhood of Electrical Workers Local 84, as exclusive representatives of its bargaining unit employees regarding terms and conditions of employment including grievance procedures and Workplace Ethics and, if an understanding is reached, embody that understanding in a signed contract.

(b) Within 14 days after service by the Region, post at its facilities in Atlanta, Georgia, copies of the attached notice.[13] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director Region 10, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. September 12, 2002

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally change terms and conditions of employment by implementing different grievance procedures for employees in bargaining units represented by International Brotherhood of Electrical Workers Local 84, or any other labor organization.

WE WILL, on request of the Union, bargain collectively regarding other grievance procedures as they may affect bargaining unit employees, with International Brotherhood of Electrical Workers Local 84, AFL–CIO–CLC, as the exclusive representative of the employees in the appropriate bargaining unit.

WE WILL NOT bargain directly with bargaining unit employees regarding the Crew Leader Selection process or Workplace Ethics.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

GEORGIA POWER COMPANY